**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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| Petition of Verizon New England Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order* | ) | **D.T.E. 04-33** |

**BRIEF OF VERIZON MASSACHUSETTS IN SUPPORT OF ITS PROPOSED TRO AMENDMENT LANGUAGE**

Since the Department issued its Arbitration Order in this proceeding on July 14, 2005 ("the Order"), the parties have resolved a host of disputes concerning the terms to be included in the compliance amendment to their interconnection agreements. As shown in the proposed Amendment ("the Amendment") filed jointly herewith, however, the parties have been unable to agree on contract language in a number of areas. Verizon Massachusetts ("Verizon MA") files this memorandum pursuant to the Reconsideration Order issued by the Department on December 16, 2005, and demonstrates that the contract language it has proposed with respect to those remaining issues (which appears in the Amendment in brackets and boldface) is reasonable, best effectuates the FCC's *Triennial Review Order ("TRO")* and *Triennial Review Remand Order ("TRRO")*, is consistent with the Department's Order and Reconsideration Order and should be adopted by the Department. Verizon MA addresses the issues in the order in which they appear in the Amendment.

**Section 2.3**

This section authorizes Verizon MA to cease providing unbundled access to the UNEs de-listed by the *TRO* or the *TRRO*, subject to the transition terms of the Amendment. (The Amendment refers to these UNEs as "Discontinued Facilities," though that term is itself the subject of a definitional dispute, addressed separately below.) The CLECs propose to insert language rendering Verizon MA's right to cease providing these de-listed UNEs "subject to and without limiting Section 4.4, below." Section 4.4, in turn, provides that the Amendment shall amend and modify the parties' interconnection agreements "only to the extent set forth expressly herein." Not content with this standard and non-controversial term, however, the CLECs would further limit the scope of the Amendment to changes in the parties' "***Section 251*** rights and obligations specifically addressed in this Amendment." (Emphasis added.)[1] This language is unnecessary, in that the agreed-upon terms of § 4.4 noted above properly limit the scope of the Amendment. It is also misleading, in that it incorrectly implies that the current interconnection agreements ("ICAs") impose some *other, non-Section 251* rights and obligations that would not be governed by the Amendment. As applied to § 2.3, the CLECs' § 4.4 language would imply that although the Amendment may allow Verizon MA to cease providing UNEs no longer required by Section 251, the ICA itself may nevertheless impose on Verizon MA some other,

[1] The CLECs also seek to insert the following in §4.4: "Furthermore, *** CLEC Acronym TXT ***'s execution of this Amendment shall not be construed as a waiver with respect to whether Verizon, prior to the Amendment Effective Date, was obligated under the Agreement to perform certain functions required by the TRO." The CLECs thus attempt to preserve the claim they asserted in the main case that the ICAs require Verizon MA to implement the FCC's new rules on commingling, conversion and routine network modifications as of the effective date of the *TRO* in October of 2003. The Department, however, has already ruled that, "[b]ecause the *Triennial Review Order* declined to override existing contracts to order automatic implementation of its rules as of a date certain, the date the new rules take effect is the effective date of the Amendment for those carriers with agreements that require negotiation and, if necessary arbitration to implement changes of law." Order at 135. The Department has also addressed the relevant effective date for those CLECs with ICAs that it believes do not require amendment to implement any changes of law. *See* Reconsideration Order at 49-50. Thus, the CLECs' proposed provision is superfluous.

non-Section 251 obligation to provide the same facilities and services to the CLECs. The CLECs insist on this language even though they cannot identify any such non-Section 251 law.

Making matters worse, the CLECs propose to insert references to § 4.4 into each of the specific sections of the Amendment that implement the *TRO's* and *TRRO*'s limitations on the availability of particular UNEs, such as fiber-to-the-home ("FTTH") loops, hybrid loops, high capacity loops and dedicated transport.[2] Thus, the CLECs would have the Amendment imply that while Verizon MA need not provide unbundled access to, say, greenfield FTTH loops pursuant to Section 251, the ICA may still require Verizon MA to provide unbundled access to those fiber loops pursuant to some other source of law.

Of course, this is simply not true. Verizon MA's obligations to provide unbundled access to FTTH loops and the other UNEs at issue here, to the extent it has any, exist solely pursuant to Section 251. While the Department left open in the Order the possibility that state law or other federal law may one day fill in some "gap" in the FCC's rules and require Verizon MA to provide unbundled access to network elements not addressed by the FCC (and the parties have included throughout the amendment references to the "Arbitration Orders" in order to preserve this aspect of the Department's decision), no such law is in force today. Certainly, the CLECs have failed to identify any such law, and the Department has noted that "we have not required [Verizon MA] to unbundle network elements solely under state law."[3] The Department likewise determined in the Order that Section 271 checklist items 4 (loops), 5 (transport), 6 (switching)

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[2] *See* Amendment §§ 3.1.1, 3.1.2 (regarding FTTH and FTTC loops), 3.2.1, 3.2.2, 3.2.3, 3.2.4 (hybrid loops), 3.3.2 (distribution sub-loop) and 3.6.2.4 (certification that requested high capacity loops and dedicated transport facilities are served by wire centers which do not meet the FCC's non-impairment criteria). *See also* Amendment §§ 3.11.1 (commingling), 3.11.2 (service eligibility criteria) and 4.7.5 (definition of "Discontinued Facilities").

[3] Consolidated Order dated December 15, 2004, D.T.E. 03-60/04-73, at 25. *See also* Order at 44 ("It may well be that there currently are no unbundling obligations arising from state law regarding the network elements affected by the Triennial Review Order or the Triennial Review Remand Order."), citing the Consolidated Order, at 26.

and 10 (databases and signaling) are not Section 251 obligations and are not subject to compulsory arbitration before the Department under Section 252. Order at 262. If Verizon MA becomes subject to any non-Section 251 unbundling obligation (which Verizon MA denies can happen), the parties would negotiate a separate agreement to implement such obligation. That far-fetched possibility, however, does not justify the redundant, misleading language the CLECs would add to Amendment § 4.4 and cross-reference throughout the Amendment.

Even if the Department had any doubt as to the scope of the current ICAs, this is not the proper proceeding in which to address such concern. The sole purpose of this proceeding is to implement the *TRO* and the *TRRO*, and the Department should reject the CLECs' proposed language seeking to re-interpret the terms of the current ICAs.

**Section 2.5.1**

This section is intended to clarify that Verizon MA's rights to discontinue UNEs under the Amendment are in addition to and do not limit any rights to discontinue UNEs Verizon MA may have under the parties' current ICA. The parties disagree on the language describing the facilities for which Verizon MA's pre-existing discontinuance rights under the ICA are preserved. Verizon MA's proposal reflects that those facilities include every "UNE that by operation of law has ceased or ceases to be subject to an unbundling requirement" under Section 251(c)(3) or the FCC's regulations, since that is the full panoply of UNEs governed by the ICAs in the first place. The CLECs on the other hand, have proposed language they might use to try to limit the future application of Verizon MA's pre-amendment discontinuance rights to "Discontinued Facilities," which they would define as those UNEs de-listed by the *TRO* or the *TRRO*. (For the definition of "Discontinued Facilities," *see* Amendment § 4.7.5.)

The CLECs' definition is too narrow. Verizon provides UNEs under the current ICA that were not de-listed by the *TRO* or the *TRRO* – DS0 loops, for example. Nothing in the *TRO*, the *TRRO* or the Order purports to alter whatever rights Verizon MA may have under the current ICAs to discontinue unbundled access to such UNEs, now or in the future, and the Amendment should make clear, as Verizon MA has proposed, that it does not alter or limit these rights.

**Section 3.1.1**

This section together with § 3.1.2 implements the FCC's rule at 47 C.F.R. § 51.319(a)(3), which states that Verizon MA need not provide unbundled access to FTTH or FTTC loops but, where it has deployed such a loop over an existing copper loop and retires the copper loop, must provide a 64 kbps voice-grade transmission path upon request. Verizon MA proposes to add to § 3.1.1 the phrase "other than a FTTH or FTTC loop" to accurately reflect the federal rules that where Verizon MA deploys a FTTH or FTTC loop to a customer already served not by an existing *copper* loop but by an existing *FTTH or FTTC* loop, Verizon MA is not required to unbundle any function of the new loop. This result is clear from the interplay of subparts (ii) and (iii) of Rule 319(a)(3). Subpart (ii) states the general rule that fiber loops need not be unbundled, qualified only by the requirement in subpart (iii) that where the ILEC deploys a fiber loop "parallel to, or in replacement of, an existing copper loop facility" and the ILEC "retires the copper loop," it must then provide unbundled access to a voice-grade path over the fiber loop. By its express terms, Rule 319(a)(3)(ii)(C) requires unbundling of the voice-grade path only where the overbuilt copper loop is retired. Where the overbuilt loop is not copper, no copper loop can be retired and thus no unbundling requirement can attach. Thus, the Amendment

should make clear that where Verizon MA deploys a new FTTH or FTTC loop over an existing FTTH or FTTC loop, it has no obligation to unbundle the new loop.

Verizon MA's clarifying language finds further support in the text of the *TRO*, in which the FCC broadly stated its rule against unbundling of fiber loops and laid out its underlying policy goal of encouraging investment and deployment of broadband facilities.[4] The FCC was likewise careful to specify that the "limited exception" to its policy against fiber unbundling applies only where an overbuilt copper loop is retired. If the Rules themselves leave any room for doubt on this issue, the text of the *TRO* puts it to rest:

> We conclude that requesting carriers are not impaired without access to FTTH loops, although we find that the level of impairment varies to some degree depending on whether such loop is a new loop or a replacement of a ***pre-existing copper loop***. With a ***limited exception*** for narrowband services, our conclusion applies to FTTH loops deployed by incumbent LECs in both new construction and overbuild situations. Only in fiber loop overbuild situations where the incumbent LEC elects to retire ***existing copper loops*** must the incumbent LEC offer unbundled access to those fiber loops, and in such cases the fiber loops must be unbundled for narrowband services only.

*TRO* ¶ 273 (emphasis added). *See also TRO* ¶ 276 (stating that the one FTTH deployment scenario where an ILEC "constructs fiber transmission facilities parallel to or in replacement of its existing copper plant" should be treated differently than the general no-unbundling rule); and *TRO* ¶ 277 (noting that the narrowband unbundling requirement of Rule 319(a)(3)(iii) "is a very limited requirement … where an incumbent LEC has deployed overbuild FTTH and elected to retire the pre-existing copper loop.") Thus, the Amendment should clarify, consistent with the FCC's intent, that the narrowband unbundling exception for FTTH and FTTC loops applies only where such a loop replaces a retired copper loop, not another fiber loop.

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[4] *See e.g. TRO* ¶ 272.

**Section 3.2.4.2**

This section provides that where a CLEC requests unbundling of an IDLC loop and no existing copper loop or UDLC loop is available to provision service, then Verizon MA shall offer to provision a loop by building a new copper loop, constructing new UDLC facilities or by way of some other, technically feasible option, at Verizon MA's choosing. The parties disagree, however, on whether and when the CLEC will pay for construction of a new copper loop or UDLC facility.

Verizon MA's language provides that where construction of a new copper loop or UDLC facility is necessary in order to provision the CLEC's order, the CLEC must pay for the build-out, including Verizon MA's tariffed, approved charges for an engineering query and an engineering work order and the actual costs of construction on a time and materials basis. This is reasonable. Section 251 and the *TRO* require Verizon MA to provide unbundled access to a DS0 loop even where the loop is provisioned over IDLC architecture, but that obligation extends only to Verizon MA's existing network; the 1996 Act does not require Verizon MA to provide unbundled access to a new, superior network not yet in existence or to build new facilities at a CLEC's request.[5] Moreover, Section 252(d)(1) guarantees Verizon MA's right to charge a reasonable rate for unbundled access based on the cost of providing service. In this case, that cost includes the cost of building a new loop. No party can reasonably claim that Verizon MA has somehow projected the cost and frequency with which it will be required to build new copper

[5] The FCC stated in *TRO* ¶ 297 that if neither a spare copper loop nor UDLC facilities are available to provide access to an IDLC loop, "incumbent LECs must present requesting carriers a technically feasible method of unbundled access" to that loop. Even if this statement could be interpreted as requiring an ILEC to build new loops to satisfy a CLEC's UNE request, sound public policy requires that the requesting carrier, not the ILEC, pay for the resulting construction costs. Otherwise, where the CLEC chooses to disconnect its UNE service before the end of the economic life of the new facility, the ILEC will be saddled with substantial stranded investment for loops that it does not need.

loops or UDLC facilities in the future in order to provision CLEC requests for UNE loops served over IDLC architecture and that Verizon MA has thereby rolled the costs of such construction into its tariffed rates for DS0 loops. Thus, though the FCC "was silent about cost recovery for activities related to providing 'technically feasible' access to narrowband IDLC loops,'" Order at 194, there can be no doubt Verizon MA can recover its costs in the specialized case where it can provide access to an IDLC loop only by building an entirely new loop.

The CLECs, in contrast, would require Verizon to pay for the full cost of building such a new loop, except in the limited circumstances in which the CLEC "requests the construction of a copper Loop or UDLC facilities when Verizon has proposed to provide a different less costly method of technically feasible access." Amendment § 3.2.4.2.[6] The CLECs' proposal is inconsistent with the Order.

The Department held in the Order that Verizon MA temporarily cannot charge its proposed rates or certain tariffed rates for providing technically feasible access to narrowband IDLC loops until the Department can develop an evidentiary record and resolve the issue of how the "proposed charges relate to the provision of narrowband IDLC loops." Order at 194. The Department provided an exception to that rule, however, applicable where Verizon MA must construct new facilities in order to provide such access: "The one exception to this finding is where a CLEC specifically requests new construction, notwithstanding Verizon's determination

[6] Even in that event, the CLECs would require the requesting carrier to pay only an engineering query charge and an engineering work order charge, leaving Verizon MA to pay the actual costs of construction. This is so because the CLECs insist that, even in these circumstances, the CLEC will be responsible only for charges "to the extent provided for in the Pricing Attachment to this Amendment," Amendment §3.2.4.2, and the Pricing Attachment does not set forth loop construction charges. Verizon MA proposes to avoid this patently unreasonable result by expressly stating in the Amendment that where Verizon MA builds a new loop or UDLC facilities at a CLEC's request, construction charges apply "even if not provided for in the Pricing Attachment."

to provide a different, less-costly method of 'technically feasible' access. In that case, Verizon may charge the CLEC for constructing the loop." *Id*.

The CLECs' proposed language mistranslates this ruling as: (1) requiring Verizon MA to build a new loop upon a CLEC's request even where Verizon MA could fully satisfy the CLEC's IDLC loop order *without building a new loop*; while (2) allowing that the CLEC would have to pay for such construction. This reading of the Order makes no sense. It is directly contrary to the Department's holding that, "Contrary to the CLECs' claims, *the ILEC* makes the decision as to what type of access to provide." Order at 193, construing the *TRO* (emphasis added). It is also inconsistent with the agreed-upon first sentence of § 3.2.4.2 specifying that Verizon MA may choose what type of access to provide "in its sole discretion." Accordingly, where Verizon is able to satisfy a CLEC's order for an IDLC loop without new construction, the CLEC has neither right nor reason to require Verizon MA to build a new loop or UDLC facilities. Thus, under the CLECs' reading of the Order, a CLEC would never pay the cost of building a new loop, effectively writing out of the Order the Department's ruling that CLECs must pay those costs in certain instances. That ruling can be effectuated, consistent with the rest of the Order and the *TRO*, only by reading it to require a requesting CLEC to pay for the costs of building a new loop or UDLC facility when that is the only way Verizon MA can provide access to the requested IDLC loop. Any other reading would penalize Verizon MA for using IDLC architecture and chill the continuing deployment of digital technology. The Department should reject the CLECs' language and approve Verizon MA's language in § 3.2.4.2.

**Section 3.3.1.2.1**

In this section, Verizon MA proposes with respect to SPOIs (single points of interconnection) that where certain conditions are satisfied, "the parties shall negotiate in good faith an amendment to the Amended Agreement memorializing the terms, conditions and rates under which Verizon will provide a SPOI." This is the same language which the Department specifically approved in the Order. The CLECs had argued in the main case that Verizon MA should be required to enter into a single agreement governing the terms, conditions and rates on which it would provision every SPOI that a CLEC might request. In response, Verizon MA explained that construction of each SPOI must take account of facts and circumstances that may vary significantly from site to site, and thus the only workable approach is for the parties to negotiate the details specific to each SPOI request at the time it is made. The Department cited the specific language proposed by Verizon MA, Order at 203, and rejected the CLECs' claims:

> In construing the FCC's rules concerning SPOI construction, we find that Verizon is correct in that ILECs are not required to negotiate the specific rates, terms, and conditions of SPOI construction until a CLEC makes a request for interconnection at a multiunit premises. This approach, as Verizon points out, allows the parties to tailor the terms to the specific circumstances of each location.

Order, at 217 (emphasis in original). The Department expressed hope that after an initial negotiation, the parties could streamline negotiations regarding later SPOI requests and offered its assistance in the event of undue protraction of negotiations. *Id*.

The CLECs now seek to obtain through contract language what the Department expressly denied them in the Order. Specifically, they propose to require Verizon MA to negotiate a separate "master agreement" (apparently not as a filed amendment to the ICA, contrary to the

FCC's rules[7]), that would set forth the "general terms and conditions" under which Verizon MA will provide SPOIs, together with "schedules that will contain specific terms and rates for the specific SPOI." *See* Amendment §§ 3.3.1.2.1 and 3.3.1.2.2. Of course, this is the same proposal – a single contract to govern all SPOI construction requests – that the Department already rejected in the Order. The CLECs should not be allowed to re-litigate this issue in the guise of a dispute over contract language. The CLECs' proposal is directly contrary to the Order, and the Department should reject it.

**Section 3.4.1**

This section sets forth the terms governing the availability of DS1 loops. In this section and in similar sections which set forth the availability of other UNEs de-listed by the *TRRO*,[8] the CLECs seek to insert the modifier "251(c)(3)" in front of the particular UNE at issue, so that the provisions of § 3.4.1, for example, would govern "unbundled access to ***251(c)(3)*** DS1 Loops…." (Emphasis added). The CLECs' proposal is unnecessary and confusing. It does not affect the substance of §3.4.1 and is not needed to implement either the *TRO* or the *TRRO*. Moreover, like the CLECs' proposed insertion in §§ 2.3 and 4.4 discussed above, the insertion here would misleadingly imply that the Amendment governs only those DS1 loops that Verizon MA must

[7] Memorandum Opinion and Order, *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty To File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, 17 FCC Rcd 19337 (2002).

[8] *See* Amendment §§ 3.4.2 (DS3 loops), 3.4.3.1 (dark fiber loops), 3.5.1 (DS1 dedicated transport), 3.5.2 (DS3 transport), 3.5.3 (dark fiber transport), 4.7.5 (definition of Discontinued Facilities). *See also* § 3.10 (line sharing). The CLECs propose a similar insertion in §3.5.4 with respect to Entrance Facilities. This is confusing and entirely unnecessary, since that paragraph explicitly states that the discontinuance of Entrance Facilities as a UNE under the Amendment does not alter any right a CLEC may have to access to interconnection facilities under Section 251(c)(2).

provide pursuant to Section 251(c)(3), but that the existing ICA requires Verizon MA to provide unbundled access to some *additional* set of DS1 loops, that are not required by Section 251(c)(3). As noted above, however, there is no law other than Section 251(c)(3) that requires Verizon MA to provide unbundled access to DS1 loops, and the CLECs cannot point to any.

In any event, the purpose of this proceeding is to arbitrate "only those terms that are necessary to implement the new rules." Order at 45. The CLECs' proposal to sprinkle the modifier "251(c)(3)" liberally throughout the Amendment is not necessary to implement the new rules and makes unnecessary comment on the scope, meaning and application of the existing ICAs, *e.g.* that they impose obligations on Verizon MA to provide UNEs entirely independent of Section 251(c)(3). The Department should not allow the CLECs to use the Amendment to re-write the existing ICAs on this issue, which is not addressed in the *TRO* or the *TRRO*.

**Section 3.4.1.1.2**

This section implements the FCC's 10-loop cap on the number of DS1 UNE loops a CLEC may obtain to serve a single building. *See* 47 C.F.R. § 51.319(a)(4)(ii). Verizon MA has proposed language to clarify that this cap covers loops ordered not only by the CLEC but by its affiliates as well.[9] Verizon MA's language is necessary to implement the rule. Without it, a CLEC that has exhausted its ten-loop limit at a given building could attempt to circumvent the rule by substituting the name of one of its affiliates on its next order. Worse yet, nothing would prevent a CLEC from creating new affiliates as needed in order to obtain additional UNEs over the applicable legal limit. The Department should approve Verizon MA's proposed language in

[9] Verizon MA proposes the same clarification in Amendment §§ 3.4.2.1.2, 3.5.1.1.2 and 3.5.2.1.2, which implement the FCC's caps on DS3 Loops, DS1 dedicated transport and DS3 dedicated transport, respectively.

order to prevent such attempts to circumvent the FCC's caps on high capacity loops and transport UNEs.

**Section 3.6.1.3**

This section requires a requesting CLEC to certify to its entitlement to a requested high-cap loop or transport facility, as required by paragraph 234 of the *TRRO*, through the method that Verizon has now built into its electronic ordering system. This consists of filling in a "c" (for "certify") in the appropriate box on the ASR or LSR by which the CLEC submits its request. Since the CLEC must submit an ASR or LSR to submit an order in any event (whether certification is required or not), Verizon's electronic certification minimizes the paperwork, time and resources needed to submit, certify and process an order, to the benefit of all parties.

The CLECs, however, propose language requiring use of this system only if it "is no more onerous than providing certification by letter." There is no rational basis for the CLECs' position. There should be no circumstances in which electronic certification—that is, typing the letter "c" on a computer screen—will be more onerous than sending a separate letter, but the CLECs' subjective language would permit them to avoid electronic certification on the basis of even the most implausible claim of undue burden. Moreover, the electronic ASR system has been designed and implemented by Verizon with ample participation by CLECs to provide for efficient ordering and provisioning of UNEs. Allowing a CLEC to certify to its entitlement to a requested UNE by submitting a paper letter, in any circumstances, would increase the cost and error rate of the ordering and provisioning process, because Verizon would have to attempt to manually match each letter-certification with the proper electronic order. Such matching could not likely be achieved because the subject circuit would not yet have a circuit identification number assigned at the time when the CLEC submitted the respective ASR, so there would be no

practical way for the CLEC, in its separate letter sent through the mail or other means, to identify the certified circuit (which might be among tens or hundreds of circuits that the CLEC ordered on a given day). Thus, the ASR would inherently lack the required certification. The incontrovertible efficiencies of the electronic system depend in large part on its applicability across the board. The exception sought by the CLECs is counterproductive, ill-defined and, in the end, illusory. The Department should reject it.

**Section 3.6.2.2**

Consistent with the Department's finding in the Order, at 287-288, this section requires Verizon MA to notify a CLEC, within 30 days of the CLEC's certification of entitlement to a high-capacity UNE loop or transport facility pursuant to paragraph 234 of the *TRRO*, that Verizon MA disputes the subject order if Verizon wishes to re-price the facility retroactively to the date of provisioning, should it prevail in the dispute.

Verizon MA has proposed Amendment terms providing that where it prevails in such a dispute but had failed to notify the CLEC that it disputes an order within the 30-day window, then Verizon MA will only be entitled to re-price the subject facility back to the date on which it provided such notice to the CLEC. The CLECs oppose this provision, presumably to allow them to argue in a particular case that Verizon MA is not entitled to *any* retroactive pricing. But the Department will have no discretion in the matter, because a finding in favor of Verizon MA on the merits means, by definition, that the subject facility was not in fact legitimately available as a UNE at TELRIC rates, and Verizon MA will be entitled – in every case in which it prevails on

the merits – to reprice its loop or transport facility retroactive at least to the date on which it gave notice to the CLEC that it disputes the CLECs' right to that UNE.[10]

Verizon MA acknowledges the Department's purpose in imposing the 30-day deadline to prevent Verizon MA from waiting for months or years to dispute a given order and then, after prevailing in the matter, present the CLEC with a large bill for back fees. *See* Order at 288. That purpose, however, is fully accomplished by precluding Verizon MA from recovering the full price for the facility between the provisioning date and the date on which it provides notice of the dispute. Thus, should Verizon MA fail to notify the CLEC of a dispute for six months, it will be precluded from recovering the difference between UNE rates and tariffed special access rates or commercial rates for that period.

Once Verizon MA has notified the CLEC of a dispute, however, the amount of time it takes to resolve that dispute is beyond the exclusive control of Verizon MA but rests with the Department and, to a large extent, the CLEC. Thus, Verizon MA should not be penalized by the forfeit of its rightful rates during that time period, and doing so would only encourage the CLEC to protract the dispute as long as possible, to extend the period in which it receives favorable TELRIC rates for a facility which is not legally available as a UNE. Verizon MA's proposed provision is reasonable and should be approved.

**Section 3.6.2.3**

This section and subsection 3.6.2.3.1 provide for the rates that will apply retroactively where, under paragraph 234 of the TRRO, Verizon MA has provisioned a high-capacity loop or dedicated transport facility that the CLEC ordered as a UNE out of a non-impaired wire center,

[10] The proper special access rate to apply in such situations is the subject of § 3.6.2.3 of the Amendment and is discussed separately below.

but it is later confirmed through the dispute resolution process that Verizon MA was not required to do so. Verizon MA proposes that in such event, the CLEC shall pay "the additional charges that would apply if [the CLEC] had ordered the subject facility or service on a month-to-month term under Verizon's interstate special access tariff," including late payment charges for the additional amounts owed. This is only reasonable, in that at the time the retroactive rates are applied, the CLEC will have been using Verizon MA's special access facility for many months without paying the full tariffed rate for the facility, though fully aware that the monthly rate for the facility is in dispute. Thus, the CLEC should be required to pay late fees on the past due amounts, just as any other debtor who contests a debt without paying it is subject to late fees and/or interest if the creditor prevails in the dispute. Again just like any other debtor, the CLEC can avoid such late fees by paying the disputed amounts to Verizon MA as they come due, subject to recovery should the CLEC later prevail in the dispute.

The CLECs seek to avoid paying any late fees or the month-to-month tariffed rates and propose instead that the retroactive prices "shall be at rates no greater than the lowest rates [CLEC] could have obtained in the first instance … had the CLEC not ordered the facility as a UNE." To begin with, this proposal would require the Department to determine, in each and every *TRRO* ¶ 234 dispute, what was the "lowest rate" the CLEC theoretically could have obtained for the subject facility back at the time of ordering. This issue could well outweigh the main issue in the case (*i.e*. whether the wire center(s) serving the given facility meets the FCC's non-impairment criteria), in terms of complexity and the time and resources it would take to resolve. Moreover, the CLECs' proposed language will encourage unnecessary and wasteful litigation. Under the CLECs' proposal, a CLEC would *always* order a high-capacity loop or transport facility as a UNE, on the off-chance that it might prevail in the subsequent dispute. If it

loses that dispute and is required to pay only the lowest rate at which the facility was available as special access, the CLEC is no worse off than if it had ordered the facility as special access in the first place. While not every CLEC will blithely ignore its duty of good faith and fair dealing, the CLECs' proposed pricing language would certainly encourage CLECs not to bother with particularly diligent inquiries before certifying an order for loop or transport UNEs and would encourage them to submit such orders even in marginal cases, where the likelihood of a finding in favor of the CLEC is small.

Further, the CLECs offer no language at all providing for retroactive prices in the difficult situation in which the facility at issue is dark fiber dedicated transport, for which there is no special access analog. In contrast, Verizon MA's proposed Amendment §3.6.2.3.1 provides that the CLEC will pay commercial rates, retroactively, in such circumstances. It is undisputed that Verizon MA is entitled to compensation for the use of its dark fiber transport and, where the Department has found that the CLEC was not entitled to unbundled access to such facility, Verizon MA is not bound by TELRIC methodology. Indeed, in such case, Verizon MA is under no obligation to provide dark fiber at all, and its rates for dark fiber transport (should it choose to make it available) are not subject to Department approval. Thus, where a CLEC has obtained access to Verizon MA's dark fiber by improperly ordering it as a UNE (in the knowledge that Verizon MA's data shows that the facility is not subject to unbundling and thus is not available to the CLEC at all), the CLEC is obligated to pay commercial rates for Verizon MA's services, as set by Verizon. In addition, since Verizon MA is not obligated to provide dark fiber other than as a Section 251 UNE, the Department should approve Verizon MA's language in § 3.6.2.3.1 authorizing it to disconnect a dark fiber transport where a dispute over its status as a

UNE is resolved in Verizon MA's favor, unless the CLEC submits an order to replace that service with "lit" service within 30 days of resolution of the dispute.

**Section 3.8.3**

By this provision, the CLECs seek to require that any bills Verizon MA issues charging any transition rate or true-up charge must identify the time period for which the charge applies, the applicable rate or true-up and "details that enable [CLEC] to identify the specific facilities to which the transition rates or true up amounts apply."

Verizon MA does not object to identifying on its bills the applicable rate or true-up charge and the relevant time period. Requiring Verizon MA to identify, on each such bill, each of the thousands of circuits or other facilities which are covered by each bill, however, would impose an unfair and unnecessary administrative burden on Verizon MA. In particular instances in which a CLEC wishes to confirm that the transition or true-up charges are assessed against the proper circuits, the CLEC already has more than enough data from which to identify those circuits itself without additional detail from Verizon MA, and the CLEC can identify those circuits with no more effort than Verizon MA would have to expend to perform the same function. There is no basis for piling this make-work onto Verizon MA's shoulders. In the unlikely event that a CLEC has a legitimate concern regarding the lack of detail on a particular bill, such concerns may be dealt with through established billing procedures that each interconnection agreement already contains. The CLECs' proposed language would serve no purpose other than to create an opportunity for CLECs to dispute Verizon's bills -- many of which Verizon has already prepared and issued based on established billing procedures – on the grounds that the bill does not meet the CLECs' newly-concocted standard for detail.

**Sections 3.9.1.1 and 3.9.1.2**

The Department determined in the Order that a CLEC may submit orders during the transition period to convert its embedded base of discontinued UNEs to alternative arrangements and may "have the orders not take effect until the end of the transition period." Order at 75. Section 3.9.1 of the amendment implements this finding, and provides that at the CLEC's request, Verizon MA "shall defer the effectiveness of any such orders to a later date, but no later than" the end of the applicable transition period.

The Department's determination was intended to promote administrative efficiency by encouraging CLECs not to "delay placing conversion orders until the end of the transition period in order to benefit from the lower transition rates." Order, at 74. Ironically, while the Department's rule guarantees the CLECs the lower transition rates throughout the transition period, it does not alleviate the administrative problems that will arise from the flood of conversion work Verizon MA will be required to perform at the close of the transition periods in order to satisfy orders placed throughout those periods. Moreover, without substantial, expensive and time consuming re-configuration of its provisioning systems, Verizon MA does not have the capability to: (1) convert a discontinued UNE to an alternative service arrangement upon receipt of a conversion order from the CLEC; (2) assign that converted circuit a temporary rate for the duration of the transition period; and then (3) automatically implement the new, post-transition rate upon the close of the transition period.

With this in mind, and in acknowledgement that the parties are more concerned that the proper rates be applied in timely fashion and are less concerned with the timeliness of the actual physical conversion of the subject facility, subsection 3.9.1.1 of the Amendment provides that if

Verizon MA is unable to complete the requested conversion or migration as of the date requested by the CLEC, Verizon MA may, as of the conversion date requested by the CLEC, charge for the subject Discontinued Facility the rate that would apply to the replacement service requested by the CLEC. By disassociating the date of the rate change from the date on which the actual conversion or migration work takes place, this provision allows the CLECs to enjoy the low transition rates up to the close of the applicable transition period, while implementing Verizon MA's right to charge post-transition rates immediately upon the close of the transition period. *See* Order, at 74, holding that Verizon MA, "may immediately re-price the embedded base to commercial rates upon the migration of a CLEC's embedded base to alternative arrangements or upon the expiration of the transition period, whichever occurs first."

The parties have agreed to this general approach, but they disagree on four particular issues in §§ 3.9.1.1 and 3.9.2.

A. <u>When conversion or migration orders must be submitted.</u>

Verizon MA proposes in § 3.9.1.1 that the CLEC must submit "timely" conversion or migration orders, "taking account of any standard [provisioning] intervals that apply, order volumes, and any preparatory activities that [CLEC] must have completed in advance." The CLECs object to Verizon MA's language and would expressly provide that a CLEC may submit conversion orders up to and including the final day of the transition period. Verizon MA requires the minimal amount of time of a standard provisioning interval, however, in order properly to re-price the Discontinued Facilities as of the close of the transition period with minimal administrative delay or error. Given that the Department has authorized the CLECs to file conversion orders throughout the transition period and to delay the effectiveness of those orders until the close of the transition period, there is no reason that a CLEC should not and

could not submit its orders and complete any preparatory activities slightly in advance of that date.

Moreover, the consequences of a CLECs' failure to submit a timely order need not be dire. Under Verizon MA's proposed language in § 3.9.2, failure to submit a timely conversion or migration order gives Verizon MA the option of disconnecting the subject facility *on 30 days' written notice*. The CLEC can thus avoid disconnection merely by ordering a new resale service, special access service or an alternative arrangement under a commercial agreement to replace the subject discontinued facility within 30 days of receipt of Verizon MA's advance notice of disconnection.

Verizon MA's proposed terms in § 3.9.1.1 and 3.9.2 are reasonable and necessary to allow it to manage its facilities where a CLEC has failed to submit any conversion or migration order for its Discontinued Facilities. In such circumstances, which Verizon MA hopes will be rare, Verizon MA should not have to sit idly by and wait for the transition period to close before it can even begin the process of recovering its facilities and obtaining reasonable commercial rates for them. Rather, where a CLEC has failed to submit a conversion or migration order a standard provisioning interval prior to the close of the transition period or has failed to prepare the facility for conversion, Verizon MA should be allowed at least to initiate the disconnection process by sending its 30-day advance written notice prior to the close of the transition period.

B. <u>The nature of the surcharge used to re-price the Discontinued Facility.</u>

As to the second issue, the parties agree that Verizon MA may re-price a Discontinued Facility as of the conversion date requested by the CLEC, and they agree that Verizon MA may temporarily apply a surcharge to the applicable transitional rate for the subject facility in order to raise that rate up to the rate that applies to the replacement service requested by the CLEC, but

the parties disagree on whether each combined transitional rate plus surcharge must "equal" the rate for the replacement service or whether it is sufficient if the total combined charges are "equivalent to" the replacement rates. The difference is more than semantic. Indeed, a requirement that the combined rate must exactly "equal" the rate for the replacement services for each individual facility could effectively preclude Verizon MA from re-pricing any UNE-P arrangements scheduled to be converted to resale, as ostensibly provided in these subsections, until long after the transition period closes, in contravention of Verizon MA's right to charge the new rates immediately upon the expiration of that period.

Whether Verizon MA's resale rates for the services that would replace UNE-P arrangements "equal" the surcharged rates depend in part on each line's usage levels and patterns, and other factors that cannot be determined in advance. Thus, Verizon MA cannot determine in advance the precise surcharge that would apply to a given UNE-P arrangement that is not converted to resale as of the close of the transition period, much less develop a unique surcharge for each of the thousands of UNE-P arrangements to be converted, such that the total charge will "equal" the would-be resale rate for each such arrangement. The CLECs' proposed requirement of "equal" rates would thereby prevent Verizon MA from making use of the re-pricing provisions of the Amendment and obtaining its rightful, post-transition rates until it can actually complete the conversion of the UNE-P arrangements to resale at some later time.

The CLECs' insistence on this requirement is particularly unreasonable in light of Verizon MA's ability and willingness to charge resale "equivalent" rates designed to replicate the total bill a CLEC would receive if their total set of UNE-P arrangements were converted to resale as of the close of the transition period. Though Verizon MA cannot develop unique, customized surcharges for *each* discontinued UNE-P arrangement, it can develop a surcharge to

be applied to *all* UNE-P arrangements, based on historical data showing the average monthly usage over such arrangements. That surcharge may result in a charge that is slightly lower or slightly higher than the resale rate would be for a particular UNE-P arrangement, but any such minor discrepancies disappear when averaged out over the many UNE-P arrangements leased by each CLEC. Consequently, Verizon MA's proposed contract language authorizing it to charge the "equivalent" of the resale rate will result in proper charges to a CLEC in the aggregate for all of its UNE-P arrangements.

The anticipated delay in performing the actual conversion of UNE-P arrangements to resale or other arrangements arises solely from the expected glut of CLEC conversion orders requesting that their UNE-P arrangements not be converted until the close of the transition period. But nothing in the *TRO*, the *TRRO* or the Order gives the CLECs the right to transitional pricing throughout the transitional period *at the expense of* Verizon MA's right to charge reasonable rates following the close of that period. Just as the Department has given the CLECs' rights as to transitional rates, it should act now to ensure Verizon MA's rights to charge post-transition rights immediately upon the close of the transition period. By approving Verizon MA's proposed language in Amendment §§ 3.9.1.1 and 3.9.2.1, the Department would protect the interests of all parties, not just those of the CLECs.

C. No notice is required before Verizon MA converts a Discontinued Facility to a replacement service where the CLEC has failed to submit a conversion order.

As agreed by the parties, Amendment § 3.9.2 provides that where a CLEC has neither requested disconnection of a Discontinued Facility nor submitted an order for a replacement service by a specified date, then Verizon MA may, "*without further notice* to [the CLEC], convert or migrate the subject Discontinued Facility to an analogous access (month-to-month

term), resale or commercial arrangement that Verizon shall identify in writing [to the CLEC]…." (Emphasis added.)

The CLECs, however, propose additional language which would require Verizon MA to notify the CLEC "at least 30 days in advance" of the particular access, resale or commercial arrangement to which the Discontinued Facility will be converted or migrated. Of course, this proposal is inconsistent with the agreed-upon language allowing Verizon MA to convert or migrate such a facility "without further notice" to the CLEC. It is also directly contrary to the Department's determination that:

> all parties have adequate advance notice of the end of transitional pricing, as transitional pricing is limited to the duration of the transition period, which sunsets on a date certain pursuant to federal law. See e.g., 47 C.F.R. § 51.319(d)(2)(iii). Therefore, ***Verizon is not required to send advance notice concerning the end of transitional pricing, but may immediately re-price the embedded base to commercial rates*** upon the migration of a CLEC's embedded base to alternative arrangements or ***upon the expiration of the transition period***, whichever occurs first.

Order, at 74. The CLECs couch their advance notice requirement as merely announcing the replacement option selected by Verizon MA, but it is an advance notice requirement nevertheless and would likely delay Verizon MA's re-pricing of the embedded base to commercial rates beyond the close of the expiration of the transition period, in violation of the *TRRO* and the Department's finding above. Moreover, the CLECs' embedded bases is subject to day-to-day churn, particularly with March 11, 2006 approaching, and it would be impossibly burdensome to take a snap-shot of hundreds of thousands of circuits and identify the specific rates that will apply to each one if the CLEC fails to arrange for a replacement service on its own volition. The Department should therefore reject the CLECs' proposal.

D. A CLEC is not entitled to continue to receive transition rates beyond the close of the transition periods by disputing whether a given embedded base facility is no longer available as a UNE under the TRRO.

In § 3.9.2.1, the parties agree that where Verizon MA is entitled to convert a Discontinued Facility to a replacement service upon expiration of the transition period under § 3.9.2, but Verizon MA is unable to complete the actual conversion by that date, it may nevertheless re-price the facility as of that date, in the same manner as provided in § 3.9.1.1 and discussed above. The CLECs, however, seek to gut the agreed-upon terms of §§ 3.9.2 and 3.9.2.1 by appending the following language:

> However, if ***CLEC Acronym TXT*** challenges Verizon designation that certain loop and transport facilities are Discontinued Facilities, Verizon shall continue to provision the subject elements as UNEs and then seek resolution of the dispute by the Department or the FCC, or through any dispute resolution process set forth in the Agreement that Verizon elects to invoke in the alternative.

By reserving the right to continue to receive transitional pricing on any Discontinue Facilities which the CLEC places in dispute (and by failing to impose any deadline on when the CLEC must bring such a dispute), the CLECs seek to reserve to themselves the unilateral power to extend the FCC's transition periods. The Department has already rejected other attempts by the CLECs to extend those transition periods in one way or the other, admonishing the parties that, "it is clear that the FCC did not intend that negotiations to comply with [the directive to LECs to conform their ICAs to the *TRRO*] should erode the one-year transition period or extend the life of an abandoned rate regime beyond March 11, 2006." Order at 75. The Department should reject this additional effort by the CLECs impermissibly to extend the FCC's transition rates beyond the close of the applicable transition period.

Moreover, the CLECs have had ample time in which to bring to the Department for resolution any legitimate dispute over Verizon MA's designation of wire centers that satisfy the

FCC's non-impairment criteria and thus no longer support UNEs under the FCC's new rules. As the Department determined in the Order, "[A]ll parties have adequate advance notice of the end of transitional pricing as transitional pricing is limited to the duration of the transition period, which sunsets on a date certain pursuant to federal law. *See e.g*. 47 C.F.R. § 51. 319(d)(2)(iii)." In addition, the CLECs have been fully aware of which wire centers Verizon MA maintains meet the FCC's non-impairment criteria since February of 2005, when Verizon filed its list of those wire centers with the FCC and posted it on its website. The Department should not allow a CLEC to extend transitional pricing of a facility by sitting on its rights for a year or more while Verizon prepares to convert thousands of circuits and then, just before or even after the close of the transition period, assert a dispute as to the accuracy of Verizon MA's wire center designations.

Finally, the CLECs offer no justification for preserving transitional pricing for a disputed facility beyond the close of the transition period. The FCC's rules provide for no exceptions to the 12-month limitation on the availability of transition rates (or 18-months for dark fiber). In order to preserve the FCC's "date certain" on which the transition periods must end, the Department should reject the CLECs' proposal and thereby require all CLEC to pay post-transition rates following expiration of the transition periods, including where the CLEC has failed to raise and resolve within the FCC-mandated transition period any dispute over whether a given facility was properly classified as a Discontinued Facility. Any policy allowing CLECs to continue to receive transitional rates until such disputes are resolved would only encourage CLECs to bring such disputes, even on marginal grounds, in order to extend the low transition rates as long as possible. On the other hand, to the extent a CLEC could possibly have a valid basis for not having raised and resolved any such dispute within the FCC-mandated transition

period, it would not be harmed by a requirement that it pay post-transition rates while litigating the proper status of the facilities, since it could seek reimbursement from Verizon MA if it were to prevail in the dispute.

**Section 3.9.3**

This section of the Amendment is gratuitous and subject to misinterpretation, and should not be added to the Amendment. The CLECs would have it provide that, "Except as permitted under Section 1.3 in the Pricing Attachment, Verizon shall not charge [CLEC] any fees associated with the conversion or migration of Discontinued Facilities to alternative arrangements." The Pricing Attachment itself, however, already addresses this issue. Section 1.2 of the Pricing Attachment provides that the charges for services provided under the Amended Agreement shall be those provided for in the Amended Agreement, including those listed in Exhibit A to that attachment. Exhibit A does not include charges for converting or disconnecting Discontinued Facilities, but Verizon may not be forced to waive any such charges that otherwise apply under the agreed language in Section 1.2 (such as negotiated or arbitrated charges contained in particular agreements). In addition, § 1.3 of the Pricing Attachment allows Verizon MA to assess charges that are not listed in Exhibit A but which are approved or allowed to go into effect by the Department or the FCC. Thus, §§ 1.2 and 1.3 of the Pricing Attachment, taken together, limit Verizon MA's ability to impose new charges for the services at issue here until and unless the Department or FCC approves or allows rates for these services. This is the precise result anticipated by the Department in finding that it is "premature" to determine rates for these activities at this time. *See* Order at 90. There is thus no need for proposed § 3.9.3 of the

Amendment, and the Department should not approve it, consistent with its decision not to address this issue "until Verizon MA submits actual rates for approval." *Id*.

Should the Department nevertheless decide to approve specific contract terms in § 3.9.3 governing the charges for conversion and disconnection of Discontinued Facilities, it should reject the CLECs' proposed language and adopt instead the terms proposed by Verizon MA, which state as follows:

> Except as permitted under Section 1.3 of the Pricing Attachment to this Amendment, as provided for in a Verizon tariff, or as otherwise agreed by the Parties, Verizon shall not charge [CLEC] any fees for the conversion (i.e. records-only changes to convert circuits that are already in service, which do not require Verizon to perform any physical installation, disconnection, or similar activities) or disconnection of a Discontinued Facility.

Amendment § 3.9.3. This language is more accurate and helpful than the CLECs' proposal in a number of ways. First, the CLECs' use of the term "conversion or migration" deliberately blurs the line between the disconnection of a Discontinued Facility and installation of alternative service. Thus, where a CLEC wishes to "migrate" a customer from a UNE-P arrangement to a UNE loop arrangement, the term "migrate" might arguably include any one-time charges associated with, for example, establishing the collocation arrangement required to provision a UNE loop. Similarly, where a CLEC discontinues and disconnects a dark fiber facility and replaces it with "lit" service, the term "migrate" could imply that Verizon MA cannot charge for "lighting" the facility by installing multiplexers and other equipment. Such results find no support in the *TRO*, *TRRO* or the Order. If Verizon MA incurs costs in establishing an alternative, replacement service, it may legitimately recover them. In any event, Verizon MA's rates for installation of alternative services are governed by tariff or a separate agreement on the

subject, not by the ICAs or the Amendment. Verizon MA's term "disconnection" is more accurate and less subject to dispute than "migration" and should be adopted.

Likewise, the CLECs' proposed ban on charges for conversions or "migrations" of Discontinued Facilities fails to exempt other agreements between the parties. The exception proposed by Verizon MA – "or otherwise agreed by the Parties" – is necessary to avoid potential conflicts between this § 3.9.3 and provisions contained in commercial agreements or other non-Section 251 agreements between the parties which authorize Verizon MA to charge a CLEC for installing services provided for in such agreement, which may or may not be used to replace the UNEs discontinued pursuant to the *TRO* and *TRRO*.

Finally, the CLECs' phrase "fees associated with" is needlessly broad. Verizon MA's proposed term "fees for" is clearer and avoids potential disputes over whether a given fee might be "associated with" a conversion even though it does not arise from the actual conversion work performed.

**Section 3.11.1.1**

This section provides that Verizon MA will not prohibit the CLEC from commingling a UNE or combination of UNEs with Wholesale Services obtained from Verizon MA and in fact will, upon the CLEC's request, perform the work necessary to combine or commingle the two.[11] The parties disagree on the details in defining the UNEs that are subject to commingling and when commingling will be available to the CLEC. As usual, the CLECs seek to render the contract ambiguous and open to future dispute and, further, seek to incorporate automatically into the Amendment any future changes of law that might expand their UNE rights, contrary to

[11] As required by the Order, at 140, this section defines "Wholesale Services" to include facilities or elements that the CLEC may obtain from Verizon MA pursuant to Section 271 of the Act or other law.

the Department's finding that "terms that address future changes in unbundling obligations are speculative and beyond the scope of this proceeding." Order at 53.

Verizon MA has proposed the following language to define the UNEs that are subject to commingling:

> an unbundled Network Element or a combination of unbundled Network Elements obtained under the Agreement or Amended Agreement pursuant to 47 U.S.C. §251(c)(3) and 47 C.F.R. Part 51, or under a Verizon UNE tariff ("Qualifying UNEs")

This is the precise language that the Department expressly approved in the Order, over the CLECs' objection that it "would limit UNE commingling to those UNEs and combinations obtained under §251 …." *See* Order, at 140-141. The Department should therefore reject the CLECs' various attempts to modify this language.

The specific proposals of the CLECs have no merit in any event:

A. "And" vs. "Or."

The CLECs propose to replace Verizon MA's reference to "47 U.S.C. §251(c)(3) and 47 C.F.R. Part 51" as quoted above with the phrase "47 U.S.C. §251(c)(3) ***or*** 47 C.F.R. Part 51." The CLECs apparently wish to imply that a CLEC might be able to obtain a UNE directly under Section 251 itself, even if the UNE is not available under the FCC's rules, or that a CLEC could obtain a UNE pursuant to the regulations that is not available under the statute. The Department should reject the CLECs' sophistry. An ILEC cannot be required to provide unbundled access to a network element without a prior finding of impairment by the FCC,[12] and the FCC's rules at 47 C.F.R. Part 51 implement Section 251. There can be no "gap" between the set of UNEs available under the statute and those available under the rules. Indeed, the decision in *USTA II*

[12] *See United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied sub nom. National Ass'n of Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004).

and subsequent denial of certiorari forecloses any argument that the FCC's rules fail to provide for UNEs that the statute would make available.[13]

B. "Other applicable law."

The CLECs also seek to expand the definition of UNEs that qualify for commingling beyond those obtained pursuant to Section 251, the FCC's regulations or a Verizon tariff to include those obtained "under other applicable law."[14] This is just a rehash of their claim, already rejected by the Department, that the Amendment should not "limit UNE commingling to those UNEs and combinations obtained under §251." In addition, as noted above with respect to § 2.3, there is no law other than Section 251 that requires Verizon MA to provide UNEs to the CLECs, and the CLECs cannot identify any such law. The CLECs' proposed language thus misleadingly refers to law that does not exist.

Verizon MA's obligation to allow commingling exists solely pursuant to Section 251 and the FCC's implementing regulations. The *TRO* and the *TRRO* attempt to implement the unbundling obligations of Section 251 only, and neither those orders nor the FCC's regulations purport to require an ILEC to allow a CLEC to commingle with the ILEC's wholesale services UNEs that the CLEC purports to have obtained *pursuant to some other, non-Section 251, law.*

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[13] The fact that the *TRRO* is subject to appeal affords no basis for the CLECs' position. It remains good law until and unless modified on appeal, in which case, the parties may or may not need to amend their ICAs pursuant to the change of law provisions therein.

[14] Amendment § 3.11.1.1, first sentence; *see also*, similar language proposed by the CLECs at the very end of that sentence. The CLECs again propose similar language in the penultimate sentence of that section, where Verizon MA proposes to cite instead to the applicable federal rule. In this particular instance, the construction of the sentence – "Moreover, to the extent and so long as required by [either "47 C.F.R. § 51.318" as proposed by Verizon MA or "applicable law" as proposed by the CLECs], Verizon shall …perform the functions necessary to commingle or combine…," is similar to other instances in the Amendment where the parties agreed to use the phrase, "in accordance with [applicable federal rule] and the Arbitration Orders." For the sake of consistency, if nothing else, this sentence should read the same way: "Moreover, in accordance with 47 C.F.R. § 51.318 and the Arbitration Orders, Verizon shall …."

If there were any such law (and there is not), the parties would have to look to that law – not Section 251 or the FCC's regulations – to determine whether a commingling right attaches to the UNEs provided thereunder. Because the Amendment and this proceeding are limited in scope to effectuating the changes of law wrought by the *TRO* and *TRRO*, the CLECs' proposed language seeking to implement a commingling obligation that they speculate might be imposed by some other law must be rejected.

Further, if the CLECs' "other applicable law" language is approved and a state or federal law that the CLECs claim imposes new UNE and commingling obligations on Verizon MA were to come into force in the future, the CLECs would undoubtedly claim that the new law constitutes "applicable law" and thus automatically binds Verizon MA without the need to amend the Agreement. The CLECs' language would thus effectively amend the existing change-of-law provisions of the ICA, which generally require negotiation and amendment of the ICA in order to effectuate a change of law. On this point, the Order is clear:

> We find that nothing in either the Triennial Review Order or the Triennial Review Remand Order invalidated existing change of law provisions requiring good faith negotiation of new terms or otherwise made amendment of those change of law provisions necessary. … As the scope of this proceeding is limited only to arbitration of terms that are necessary to implement the unbundling rules promulgated by the Triennial Review Order and the Triennial Review Remand Order, ***terms that address future changes in unbundling obligations are speculative and beyond the scope of this proceeding***.

Order at 52-53 (emphasis added). Just as the Department rejected Verizon MA's proposed terms that would have incorporated future changes to the FCC's rules into the ICAs without need for amendment, on the grounds that doing so would effectively amend the change-of-law provisions of the ICAs, so must the Department reject the CLECs' attempt to amend the change-of-law

provisions of the ICAs by providing for automatic incorporation into the ICAs of any future changes in law imposing new UNE obligations on Verizon MA.

C. "Qualifying" UNEs.

The CLECs continue to object to Verizon MA's use of the definitional term "Qualifying UNEs" in §§ 3.11.1.1 and 3.11.1.2 to refer to those UNEs that are subject to commingling. The Department has specifically approved the use of that term, however, and rejected the CLEC's objections to it. *See* Order at 140-141. Moreover, the term "Qualifying UNEs" does not alter the substance of the Amendment and is helpful in making the repeated references to UNEs subject to commingling clear.

**Section 3 –**

The CLECs wish to insert into the Amendment, just before § 3.11.2, a one-sentence section titled "Combinations" and stating that "Verizon shall provide access to UNE combinations upon request in accordance with applicable law." The Department should reject this statement. Verizon MA's obligation to combine UNEs for CLECs pre-dates the *TRO* and *TRRO*, and the parties rights on this general issue are addressed in the existing ICAs. Moreover, to the extent the *TRO* made changes in combination rights with respect to EELs, those changes are implemented through the exhaustive and detailed terms of §3.11, which take up four pages of the Amendment. The broad, general statement demanded by the CLECs is unnecessary, provides no guidance to the parties and is open to substantial disagreement as to its meaning. The Department should reject it.

**Section 3.11.2.2**

This section provides that if an EEL is or becomes non-compliant with the FCC's eligibility criteria, Verizon MA may reprice that EEL as of the date of non-compliance if the CLEC has neither submitted "an LSR or ASR" to disconnect the facility nor secured an alternative arrangement to replace the EEL. The CLECs propose that the phrase "an LSR or ASR" is too limited, and that the CLECs should be allowed to submit "other documentation" in place of an LSR or ASR where the disconnection is "managed as a project." Even in the case of a project, however, Verizon's provisioning systems require a CLEC to submit an LSR or ASR to request disconnection of a facility. The language proposed by the CLECs is thus unnecessary and could lead to confusion in the event a CLEC fails to properly request disconnection through the LSR or ASR process.

Section 3.11.2.2 also provides that in re-pricing the former EEL, Verizon may apply a new rate or a surcharge to be equivalent to "an analogous access service or other analogous arrangement that Verizon shall identify in a written notice to [CLEC]." Although the parties have agreed on this language, the CLECs seek to append additional terms, similar to the language they seek in § 3.6.2.3, providing that the new rate "shall be no greater than the lowest rate [CLEC] could have otherwise obtained for an analogous access service or other analogous arrangement." This language is inappropriate for reasons similar to those discussed above with respect to § 3.6.2.3. Namely, it is unduly burdensome to require Verizon MA to determine in each instance the lowest rate the CLEC theoretically could have obtained for analogous services had it not ordered the subject facility as a UNE combination or commingled facility or had it submitted a timely request for disconnection. Given that re-pricing will be necessary only where the CLEC has improperly obtained an EEL without right and/or has failed to request

disconnection, it is the CLEC, not Verizon MA, that should bear the consequences of the CLEC's improper conduct. Moreover, a guarantee that a former EEL will be re-priced at the "lowest possible" replacement rate will only encourage CLECs to seek EELs where their entitlement is questionable and to ignore their responsibilities to submit timely requests for disconnection or make alternative arrangements where the EEL fails to meet or no longer meets the FCC's eligibility criteria.

**Section 3.12.1**

This section sets forth the terms governing routine network modifications. The parties agree that the provisions set forth in this section are intended to be "[i]n accordance with 47 C.F.R. § 51.319(a)(8) and (e)(5)," which are the applicable provisions of the FCC's new *TRO* rules. The CLECs propose to add the term "or applicable law" to this term. The only laws that currently impose an obligation on Verizon MA to perform routine network modifications, however, are the FCC's rules. Once again, the CLECs wish to make the Amendment as vague and open-ended as possible, but they can point to no other "applicable law" that imposes an obligation on Verizon MA to perform routine network modifications. Moreover, as noted above, the purpose of this arbitration and the Amendment is to implement the *TRO* and the *TRRO*, *not* to implement some other law, and the Department has ruled that the Amendment should not provide for automatic incorporation of any changes of law in the future – be they new FCC rules or new "other applicable" law purporting to impose routine network modifications on Verizon MA.

**Section 4.7.4**

Verizon MA proposes to include in this section a definition of "dark fiber transport," to which the CLECs object. Although the Department found in the order that it is unnecessary to incorporate into the Amendment the definitions of terms that were not altered by the *TRO* or *TRRO*, *see* Order at 90, n. 44, and 103, the parties have nevertheless included a number of such definitions in the Amendment, for purposes of clarity, convenience and uniformity among the various ICAs. *See e.g.*, Amendment §§ 4.7.8 (DS1 Loop), 4.7.9 (DS3 Loop), 4.7.10 (entrance facility), 4.7.13 (Four-Line Carve Out Switching) and 4.7.17 (Hybrid Loop). That reasoning is equally applicable here, because the Amendment addresses the parties' rights and obligations with respect to dark fiber transport, but the ICAs as currently written do not define the term. Prudence and the goal of avoiding future disputes dictate that the Amendment should define what will be a material term in the amended ICAs.

**Section 4.7.5**

This is the definition of the term "dedicated transport." The first sentence has been revised to reflect the Department's ruling in the Reconsideration Order. Consistent with the *TRO* and *TRRO*, Verizon MA has proposed language to make clear that dedicated transport includes only Verizon transmission facilities "within a LATA." The CLECs reject this term, but they cannot reasonably argue that the FCC intended for dedicated transport to cross LATA boundaries, in light of the FCC's statement that, "We limit our definition of dedicated transport under section 251(c)(3) to those transmission facilities connecting incumbent LEC switches and wire centers within a LATA." *TRO* ¶ 365 (footnote omitted). Thus, the FCC's intraLATA

limitation on dedicated transport should be incorporated into the definition used in the Amendment.

**Section 4.7.6**

This is the definition of "Discontinued Facility," which the Department found was necessary to include in the Amendment "for clarity, and to reduce the risk of future litigation." Order, at 96. As Verizon MA originally proposed it, the definition read in part as follows:

> Discontinued Facility. Any facility that Verizon, at any time, has provided or offered to provide to [CLEC] on an unbundled basis pursuant to 47 U.S.C. § 251(c)(3) and/or 47 C.F.R. Part 51 (whether under the Agreement, a Verizon tariff, or a Verizon SGAT), but which by operation of law has ceased or ceases to be subject to an unbundling requirement under 47 U.S.C. § 251(c)(3) or 47 C.F.R. Part 51. By way of example and not by way of limitation, Discontinued Facilities include the following, whether as stand-alone facilities or combined with other facilities: [itemized list of facilities] and (i) any other facility or class of facilities as to which the FCC has not made a finding of impairment that remains effective, or as to which the FCC makes (or has made) a finding of nonimpairment.

Verizon Amendment 2, § 4.7.5.

The Department required only two changes in this language. First, the Department found that the final phrase of the definition would "provide for the automatic implementation of UNEs delisted in the future," and must be stricken. Order at 97. Second, the Department required the Amendment to drop the term "FTTP" in favor of the FCC's terms "FTTH" and "FTTC." *Id*. Significantly, the Department did not suggest any changes to the first sentence of the definition or the opening terms of the second sentence, expressly stating that the listed facilities are examples only.

Verizon MA has made the changes required by the Department, among others (including changes requested by the CLECs). Verizon MA has even deleted the phrase "or ceases" from

the first sentence, to further address the Department's finding that the Amendment should not provide for automatic implementation of future UNE de-listings. As a result of the parties' negotiations, Verizon MA has also simplified the first sentence, so that it would now define Discontinued Facilities as any facility that Verizon has provided "pursuant to the Agreement or a Verizon tariff but which has ceased to be subject to an unbundling requirement under 47 U.S.C. § 251(c)(3) or 47 C.F.R. Part 51."

The CLECs, however, insist on additional changes to this section that are not justified by the Order and would play games with Verizon MA's rights. First, the CLECs would replace the reference to Section 251 and Part 51 with the phrase "under the *TRO* or the *TRRO*." Verizon MA's language has already been approved by the Department, however, and should stand. There is no reason for the CLECs' ambiguous reference to "the *TRO* or the *TRRO*" when the unbundling rules adopted in those orders have been codified in Part 51 of the Code of Federal Regulations. References to the *TRO* and *TRRO* also would not capture FCC rulings that the amendment is intended to implement but which are contained in orders other than the TRO and TRRO, including, but not limited to, the FCC's August 9, 2004 order regarding fiber loops in MDU situations, the FCC's October 8, 2004 order regarding fiber-to-the-curb and other issues.

More importantly, the CLECs would delete the prefatory phrase "By way of example and not by way of limitation" in the second sentence and replace the phrase "include the following" with "are," thereby converting the definition's itemization of facilities from examples to an exhaustive list. The itemization is useful for illustration and to preclude disputes as to the items listed, but there is no basis for making it exclusive. Verizon MA's right not to provide unbundled access to a facility depends on whether that facility must be unbundled under the FCC's Rules, as provided in the first sentence of this section. The parties' rights should not turn

on a game of "gotcha" in which a failure by Verizon MA to include in the itemized list every facility delisted by the FCC or a failure to specify every possible type and sub-category of a facility that *is* on the list (such as every variety of feeder loop or OCn dedicated transport), would result in an obligation to provide unbundled access to such facility, even though the FCC's rules no longer impose such an obligation. The CLECs' game could thus allow them to try to obtain UNEs that are no longer allowed under federal law. The Department should refuse to play that game and should reject the CLECs' changes to this section.

**Exhibit A to Pricing Attachment**

**Footnotes 2 and 3**

These footnotes provide that where Verizon MA performs routine network modifications, Engineering Query and Engineering Work Order charges apply in addition to the charges for the network modifications themselves. The parties disagree only on the wording of the proviso that these Engineering charges do not apply to routine network modifications until the Department or the FCC has approved a rate for the relevant routine network modification, as provided in ¶ 1.3 of the Pricing Attachment. Verizon MA's proposed language is only intended to clarify that where Verizon MA may assess appropriate Engineering charges where it performs a routine network modification for which Verizon is already permitted under the Agreement to charge a rate, even though the Department may not have yet approved rates for all other routine network modifications. The CLECs cannot reasonably argue that Verizon must first obtain approved rates for all possible routine network modifications before it may assess Engineering charges in relation to any of them.

## CONCLUSION

For the foregoing reasons, the Department should approve Verizon MA's proposed terms for the Amendment and should reject the terms proposed by the CLECs.

Respectfully submitted,

VERIZON MASSACHUSETTS

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